tioner for a writ of *habeas corpus*, any State from being impleaded in a Federal Court by any person whatever. It should be interpreted in favor of the immunity, and to defeat every decree which should betray or impair it. Devices which do not assail directly, but which furtively avoid the thing forbidden in form, but do the thing substantially and in effect, are contrary to the true purpose and meaning of the Amendment.

An injunction against a State's officers destroys an essential function of State autonomy—the power to sue her debtor in her own Court and by her own officers, even though such suit should be a violation of a contract with her citizens in spirit and in terms.

ALEXANDER DURBIN LAUER.

DEPARTMENT OF CARRIERS AND TRANSPORTATION COMPANIES.

EDITOR-IN-CHIEF,
CHARLES F. BEACH, JR.
Assisted by
LAWRENCE GODKIN, OWEN WISTER.

POUILIN *v.* CANADIAN PACIFIC RAILWAY CO.[1] CIRCUIT COURT OF APPEALS, SIXTH DISTRICT, OCTOBER 11, 1892.

Ejection of Passenger—Defective Ticket – Contributory Negligence.

The plaintiff asked at the city ticket office of the defendant for a ticket from Detroit to Quebec and return. By an error of the agent he was sold a ticket in two coupons, both reading from Detroit to Quebec alike. On inquiring the meaning of this at the station, he was told by an agent, who stated he was unauthorized, that he thought conductors would understand the mistake. The plaintiff made no further inquiries, and after three weeks on his return journey, one conductor accepted the coupon reading the wrong way, but later in the journey the plaintiff was ejected by a second conductor, who refused to accept the irregular coupon.

Held: (1) The face of a ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company.

(2) The plaintiff was bound to know the law, and either by due diligence could have avoided the damages growing out of the negligence of the defendant, or was bound to use due diligence to reduce damages resulting from the defendant's breach of contract; and that this omission was negligence as a matter of law, not requiring to be submitted to the jury. BROWN, J., dissenting.

(3) That a breach of rules in the plaintiff's favor by one conductor did not affect the plaintiff's legal position.

[1] 52 Fed. Rep., No. 2, p. 197.

STATEMENT OF THE CASE.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action on the case by John B. Poulin against the Canadian Pacific Railway Company to recover damages for ejection from a train. The declaration was demurred to on the ground that it should have sounded in contract. Demurrer overruled. Jury instructed to find for defendant. Plaintiff brings error. Affirmed.

PASSENGERS' REMEDY FOR BEING EJECTED FROM TRAIN, BECAUSE, OWING TO FAULT OF TICKET AGENT, HE HAS NOT PROPER TICKET.

The circumstances of this case involve a number of parties—three that invariably occur when this species of controversy arises between a plaintiff passenger and a defendant railroad company, and two additional parties, whose presence tends to confuse, but not to alter, the position of the other three. The important persons are two agents of the same principal, one of whom makes a mistake, the second of whom enforces the rules of his principal, while the third person is the plaintiff who, owing to the original mistake of the first agent, falls a victim to the rules enforced by the second.

When the plaintiff asked for a round-trip ticket between Detroit and Quebec he was not given what he paid for, and a breach of contract then occurred. When he was ejected from the train returning from Quebec it was because he did not have what he had asked and paid for, but something that on its face gave him no right to be on that train. For this ejection he brought an action on the case against the company whose agent had ejected him. The Court directed a verdict for the defendant, on which the judgment was affirmed, but for a reason altogether independent of whatever rights are created by the above stated facts, and forming no part of the special law of Common Carriers or of Agency. This was the plaintiff's contributory negligence in not taking steps to avoid the inconvenience made imminent by the carelessness of the defendant's agent.

This question must be considered before the others involved. For though the case rests upon it, it is not the main question; but, as will later be seen, supposing the plaintiff had not been considered guilty of contributory negligence, his right under the circumstances to ride with a wrong ticket remains to be examined. Both the outgoing and returning coupon were printed "Detroit to Quebec," instead of the latter's reading the reverse way, as is customary in excursion tickets. This the plaintiff noticed at the station. The man who re-assured him was by his own account not in a position to declare tickets valid or invalid. The plaintiff reached Quebec duly, and remained there for three weeks, during which he made no inquiry

about his return coupon. An inquiry at the company's office would have corrected the error and averted the inconvenience. On the return trip one conductor accepted the plaintiff's explanation and allowed him to travel; but a subsequent conductor refused to take a ticket which read the wrong way, and demanded payment of fare. The plaintiff could not pay, and was ejected.

The man who reassured the plaintiff when he started, and the conductor who accepted his explanation on the return trip, made no change in the plaintiff's position. Neither of them had authority to alter the import of tickets, and furthermore the plaintiff suffered nothing by their acts. They, therefore, drop out of the case. The plaintiff was misinformed by a man who told him at the time he had nothing to do with it, and that the regular agent was not there. As the plaintiff had three weeks to inquire and neglected to do so, the Court considered he had omitted a legal duty, namely, to shield the defendant from the consequences of his breach of contract, and was hence precluded from recovery by this contributory negligence. One Judge dissented on the ground that it should have been left to the jury whether the plaintiff's duty under the circumstances was a reasonable one or not.

If the question was, "Did the plaintiff do what ordinarily prudent passengers do under similar circumstances?" the question of fact as to what ordinarily prudent passengers do was one of a sort on which the jury frequently have a right to pass.

If the plaintiff was bound to know the law that a ticket is not good in a direction opposite to that in which it reads, then there was nothing to submit to the jury. Or again, if there was the duty to shield the defendant from the consequences of his mistake, which the law imposes in a wide range of cases, then it seems there may have been still for the jury the question whether the circumstances imposed this duty on the particular plaintiff.

But on the whole, the view taken by the majority of the Court seems in accordance with the accepted rule that "when the duty is defined a failure to perform it is of course negligence, and may be so declared by the Court:" STORY, J., in McCully *v.* Clarke and Thaw, 40 Pa. Stat., p. 406. There was no doubt the plaintiff could read. There was no doubt his suspicions about the ticket had been raised, for he asked about it. It would then seem that it was in the province of the Court to declare he was negligent in taking no further steps. For though in one sense there was no formulated standard of prudence (such as looking out for approaching trains at a crossing), still there could not be much difference of opinion as to what a man should do who knew he held a ticket which read the wrong way, and had three weeks to inquire whether he could use it so or not.

The next question in the case was raised by the demurrer to the plaintiff's action, overruled in the Court below. The Circuit Court expresses no opinion whether the action should have been in the nature of tort or of contract, deciding independently on the ground of contributory negligence.

There are numerous cases in which tort arises out of a breach

of contract, and the plaintiff has his election as to which form of action he will use.

In Brown *v.* Boorman, 11 Clark & F., 1, where the status of agency was created in the defendant by a contract made between him and the plaintiff to sell and deliver oil, one of the terms being not to deliver without payment. This the defendant violated. The declaration was in case. The Court said: "I apprehend, therefore, that whether this count be in contract or in tort is quite immaterial; it is a count on the case, setting out the circumstances and facts of which the plaintiff complains; he shows a cause of action by showing a contract, a duty, and a breach; and if so, it is a good count in an action on the case, and he is entitled to his judgment." More specifically, and to the same effect, is Burnett *v.* Lynch, 5 Barn & C., p. 609. And in general, where a contract has established certain special duties between its parties, obligations to perform certain acts, a damage resulting from failure to perform them is more nearly allied to tort, and the plaintiff's election will be determined by the nature of the case, the remedy, the number of parties, etc.: 1 Chit. Pl., 135, 397. There are many cases in which recovery in assumpsit would not meet adequately the damage sustained, but where the plaintiff by bringing case may claim compensation for a larger class of injuries resulting from the same act of the defendant.

In R. R. Co. *v.* Constable, 39 Md., 150, it is held that where the law imposes upon a party an obligation which he neglects to perform, whereby damage results to another, the party injured may bring an action on the case founded in tort. The duty arose out of a contract to keep fences in repair, the neglect of which resulted in damage to crops.

In Green *v.* Clarke, 12 N. Y., 343, the action of tort was sustained for loss of goods where the plaintiff could not have sued in contract, as the contract had not been made by himself personally. In election between contract and tort the plaintiff himself must suffer the damage, or there can be no action for negligence. Harter *v.* Morris, 18 Ohio St., 492; Illinois, etc., Ry. *v.* Benton, 69 Ill., 174; Smith *v.* Leavenworth, 15 Kansas, 81; Scott *v.* Nat. Bank of Chester Valley, 72 Penn. St., 471.

In cases where the circumstances more closely resemble the present one, decisions seem to vary.

In MacKay *v.* Railroad Co., 11 S. E. Rep., 737, the plaintiff had purchased what was regarded as a round trip ticket between Ravenswood and Wheeling, but it proved like the two coupons in the present case—each end read the same way. The defendant refused to pay his fare, was ejected, and brought trespass on the case. The Court say: "There is no act of trespass shown by this evidence. . . . The evidence does show a breach of the company's contract to convey the plaintiff. . . . . He can not maintain an action for ejection . . . but must look to the breach of contract."

In Bradshaw *v.* South Boston Railroad Co., 135 Mass., 407, the same view is taken by the Court: "It follows that the plaintiff was where he had no right to be after his refusal to pay his fare, and that he might properly be ejected from the car." The plaintiff was there-

fore not allowed to maintain his action of tort.

In Murdock *v.* Boston & Albany Railroad Co., 137 Mass., 293, the plaintiff brought tort for being expelled from a train of the defendant's. The plaintiff was sold a ticket that the conductor properly refused to accept. The mistake was the agent's, on whose assurances the plaintiff took his ticket. Here the plaintiff was allowed to maintain his action of tort. It is difficult to follow the distinction made by the court, that in the case of Bradshaw *v.* Railroad Co. the agent had neglected to give the plaintiff any ticket, and that here the agent had given him a wrong ticket. But if the distinction is valid, the two preceding cases are consistent.

In Hufford *v.* Grand Rapids & Indiana Ry. Co. 53 Mich., 118, the Court is doubtful, but seems inclined to hold that an action of tort would lie: "The plaintiff . . . should have paid his fare and looked afterward to the railroad company for the refunding of the money. . . But we are all of opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car." And see Townsend *v.* Ry. Co., 56 N. Y., 295; Railroad Co. *v.* Griffin, 68 Ill., 499; McClure *v.* Railroad Co., 34 Md., 532; Shelton *v.* R. R. Co., 29 Ohio St., 214; Downs *v.* R. R. Co., 36 Conn., 287; Petrie *v.* R. R. Co., 42 N. J. Law, 449. Some of these, however, would only impliedly seem to favor the view that the plaintiff has his election, and this doctrine is not necessarily involved in their decisions.

In the present case the Circuit Court avoids deciding the question. On the overruling of the demurrer to the form of action by the Court below, it is said: "Upon the correctness of the conclusion there reached we do not express an opinion."

It is to be understood that this apparent uncertainty (See 47 Fed. Rep., p. 860-861) obtains only in the particular line of cases here presented. Where goods have been damaged during transportation the plaintiff may declare either in case or assumpsit.

The next point is that where a ticket reads one way between two towns, does this give its holder the right to travel the opposite way between those same towns?

In Pennsylvania Company *v.* Bray, 125 Indiana, 229, the passenger presented the wrong end of a return ticket, explaining when his attention was called to it that this was the end given back to him by the conductor on the outgoing trip, who had made a mistake in retaining the incoming coupon. The Court was asked to instruct that: "If a passenger gets on a railroad train and presents for passage a ticket which on its face shows that it is not good for passage on that train, he is bound to pay his fare and look afterward to the company to refund the money and make him compensation for his trouble; but if he refuses to pay his fare, and is expelled from the train, he cannot recover damages." This instruction was refused. On appeal the Court held it was no error to refuse the instruction.

Where a passenger presented a ticket good from M to H, intending to ride from H to M, this ticket was admitted to be invalid: Pease *v.* Ry. Co., 101 N. Y., p. 369.

So in Keeley *v.* Boston & Maine R. R. Co., 67 Me., 163, a passen-

ger going from Boston to Portland presented a ticket reading from Portland to Boston. A conductor had told him it was good. The Court said: "Does a ticket one way give the right to pass the other way instead? We find no case deciding that it does. . . . Such is not the contract which the ticket is evidence of. . . . The conductor merely expressed an opinion about a matter with which he at the time had no business. The plaintiff had ample opportunity to purchase another ticket, and should have done so." This was an action on the case and the plaintiff was nonsuited.

From the three preceding cases it would seem that a single ticket reading the opposite way from that in which a passenger is going is valueless, while the wrong part of a return ticket may be explained into validity: See also Godfrey *v.* Ry. Co., 116 Ind., 30; Ry. Co. *v.* Fix, 89 Ind., 381.

These Indiana cases raise the further question: "What evidence is the face of a ticket as between the passenger and conductor?" As between the passenger and the railroad company the law seems tolerably well settled: that if by carelessness a wrong ticket is sold, there is a breach of contract. In other words, the ticket is not conclusive evidence of the contract: Quivly *v.* Vanderbilt, 17 N. Y., 306; Rawson *v.* Railroad Co., 48 N. Y., 212; Van Buskirk *v.* Roberts, 31 N. Y., 661; Henderson *v.* Stevenson, L. R., 2 H. L. Sc., 470; Railroad Co. *v.* Harris, 12 Wall., 65; Peterson *v.* Railroad Co., 80 Iowa, 97; Georgia R. Co. *v.* Olds, 77 Ga., 673; Bradshaw *v.* Railroad Co., *supra;* Murdock *v.* Railroad Co., 137 Mass., 293. This does not seem to be disputed. But as between conductor and passenger opposite views are found. Sometimes the ticket is held to be conclusive evidence of the passenger's rights.

Hufford *v.* Grand Rapids and Indiana Ry. Co., 53 Mich., 118, the plaintiff asked for a ticket from Marton to Traverse City. Its appearance caused him to question the agent if it was good, and the agent informed him that it was. It was not; and to avoid being put off the car the plaintiff paid the fare to the conductor, bringing case for being wrongfully threatened with expulsion. The Court adopted the rule of an earlier case (Frederick *v.* Marquette, etc., R. R. Co., 37 Mich., 342) that "the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares."

This seems unqualified; and a number of cases fall into line with it: Townsend *v.* R. R. Co., 56 N. Y., 295; Chicago, etc., R. R. Co. *v.* Griffin, 68 Ill., 499; McClure *v.* Philadelphia, etc., R. R. Co., 34 Md., 532; Shelton *v.* Lake Shore, etc., R. R. Co., 29 Ohio St., 214; Downs *v.* N. Y., etc., R. R. Co., 36 Conn., 287; Petrie *v.* Pennsylvania R. R. Co., 42 N. J. Law, 449; Yorton *v.* Milwaukee R. R. Co., 54 Wis., 234. In some of these cases the passenger changes from one train to another, and has been prematurely deprived of his ticket by a conductor's mistake, or has been given in exchange for it a paper of a lower grade than the original ticket, not giving a right to ride on first-class trains; or has not been

handed a stop-over check when justly entitled to it, and thus has no ticket to show, but only his word that he had one and was deprived of it. In all of them the same rule is applied—a passenger must have a ticket and the right one, or he must pay his fare; and no explanation can be received in lieu of a ticket. The mistake of an agent in depriving a passenger of the evidence of his right to ride in a train gives the passenger a remedy against the company for breach of contract, but no right to insist on riding in the train.

Pennsylvania Co. *v.* Bray, 125 Ind., 229. Here, it may be remembered, the mistake of one conductor was in returning the wrong coupon of an excursion ticket. The passenger, on refusal to pay his fare, was ejected by the other conductor. The Court below was asked to instruct that "the ticket presented by the passenger is conclusive as to whether or not he is entitled to passage on said train." The Court refused so to instruct, and was sustained on appeal following Lake Erie, etc., Ry. Co. *v.* Fix.

This case seems to lay down the contrary rule that a passenger need not have the proper ticket, and an explanation may be received in lieu of it. The mistake of an agent does not destroy the passenger's right to ride on a train.

There remains to ascertain from these cases what has been said about the position of the second agent—the conductor who ejects the passenger, and of the passenger's position who is ejected. It has been said already that these cases involve three necessary parties: agent A, who makes the original mistake; agent B, who ejects or threatens to eject the passenger; and the passenger who falls between them. It is agent B and the passenger that are now to be considered.

Townsend *v.* R. R. Co., 56 N.Y., 295. Passenger prematurely deprived of his ticket through mistake of agent A. Agent B, on his resisting, puts him off. Trespass brought by plaintiff. The Court (pp. 300–302): "I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. For the wrongful act in taking his ticket he has a complete remedy against the company. . . . The question is . . . whether resistance . . . was lawful on the part of the plaintiff. If so, the singular case is presented where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had the right to repel force by force and use all that was necessary to retain his seat in the car. . . . No one has a right to resort to force to compel the performance of a contract made with him by another. . . . This rule will prevent breaches of the peace instead of producing them."

Yorton *v.* Milwaukee, Lake Shore & Western Ry. Co., 6 Am. and English Ry. Cases, 322. Passenger asked for a stop-over ticket, and by mistake of agent A received a check good only on the train he was stopping off from. Agent B forcibly ejected him from a subsequent train.

The Court (pp. 324–327): "Was the plaintiff entitled to ride on a subsequent train, not having a proper stop-over check, or was the second conductor justified under

the circumstances in putting him off the train when he refused to pay his fare? . . . Now it is practically conceded that the defendant company had such a rule or regulation for the guide of its conductors. . . . It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare and that (agent A) had made a mistake in not giving him a stop-over check. . . . That conductor, therefore, had the lawful right to eject him. . . . He was not entitled to a passage on that train."

Toledo, Wabash & Western Ry. Co. *v.* McDonough, 53 Ind., 289. Passenger's first-class ticket was taken by agent A, who gave him in exchange a card which agent B refused to receive, and ejected him. The Court, p. 293: "The jury may have found that the conductor (agent A) . . . assured the plaintiff . . . that the card would assure him transportation. . . . If he did so assure him, we do not see why the company is not liable for the act of the other conductor (agent B) in putting him off."

It is not easy to reconcile this with the two preceding cases.

Lake Erie & Western Ry. Co. *v.* Fix., 88 Ind., 382. Passenger's round trip ticket was taken by agent A, who by mistake returned him the wrong half. Agent B. ejected him. The Court, p. 384: "One who acts in good faith ought not to be deprived of his rights through the fault of the servant of the carrier who has undertaken to carry him safely." So here the action to recover damages for ejection was held rightly laid.

In Pennsylvania Co. *v.* Bray (*supra*) the Court is asked to instruct that "if such ticket shows on its face that the passenger is not entitled to passage on said train, the conductor may lawfully eject him therefrom unless he pays his fare." This instruction was refused.

These cases are sufficient to show that the rights of agent B and the passengers in the matter of ejection are viewed differently in different courts. Nor can it be said that any real distinction is stated, or can be found, between the return coupon cases and others.

In Hufford *v.* Grand Rapids & Ind. Ry. Co., 53 Mich., 118, the Court does not seem willing to announce either rule squarely. It is said (pp. 120–121) that the passenger "had better submit to the temporary inconvenience" of paying his fare, "and it would have been very prudent and proper for him to adopt this course, . . . but we are all of opinion that if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

On the other hand, there is a case which adopts the view that, under a by-law prohibiting a person from traveling without first paying his fare and obtaining a ticket, the company are justified in removing from the train a person without a ticket, though he offers to pay his fare. The plaintiff knew of the by-law, but this hardly seems to distinguish this case from those preceding: McCarthy *v.* Dublin, etc. Ry. Co., I. R., 5 C. L., 244.

From an examination of the foregoing cases, it seems difficult to extract any theory that will reconcile them, except that they were decided rather according to the amount of undeserved hardship of each individual plaintiff than on

settled principles of law. In fact, may it not be that the question of contributory negligence, though seldom specifically at issue, is the latent reason for many of the decisions? This would certainly furnish a reasonable distinction between such cases as Keeley *v.* Boston & Maine R. R. Co., where the passenger had plenty of opportunity to get a proper ticket, and Toledo, Wabash & Western Ry. Co. *v.* McDonough, 53 Ind., 289, where the passenger on one train was given in exchange a ticket not good on a second train into which he was peremptorily ordered to get. Here he had no chance to avert the ejection which followed.

The chief confusion, perhaps, in these cases is the manner of regarding the tort, or the passenger's right to bring tort. The presence of agent B seems to shunt much of the reasoning off to a side track. Not infrequently the Court will say: The mistake was made by agent A; that was a breach of contract for which the passenger has his remedy. But agent B acted in strict accordance with his duty in ejecting a passenger who had no adequate evidence of his right to ride on the train. Therefore B committed no wrong, and how can there be a tort?

The fallacy of this lies in not looking at the original contract from the breach of which the injury resulted, and from which the right of action springs. If there has been any wrong at all, how can agent B's proper conduct correct it when this conduct merely carries on the wrong done? The fact that the ejected passenger could not bring trespass against this agent B for the act of ejecting him has nothing to do with the passenger's right against the company whose mistake placed him in a position to be ejected. The doctrine of election between contract and tort is simply, that when a breach of contract leads to a damage, the sufferer may sue on his damage if he finds it to his advantage to do so. Therefore, that logic which from the premise that agent B committed no wrong deduces the conclusion that the passenger suffered no wrong, would pretty nearly abolish the doctrine of election. But it is easy to see that the premise concerning agent B leads merely to the conclusion that, as between him and the passenger, there is no assault, and leaves untouched the real issue between the passenger and the railway company.

The conclusions to be drawn from all these cases are hard to state; but it would seem that the best authorities are in favor of the following propositions:

(1) A passenger properly ejected for lack of proper ticket may recover in tort or contract.

(2) As between the passenger and the railroad, the face of a ticket is not conclusive evidence of his rights.

(3) As between the passenger and the conductor, the face of a ticket is conclusive evidence of his rights.

(4) Contributory negligence on the passenger's part may intervene and apparently reverse any one of the three preceding propositions, though this factor seldom appears in the language of the courts.

OWEN WISTER.